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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER DAVID IVERSON, Defendant and Appellant.	D060876 (Super. Ct. No. SCS248153)

APPEAL from a judgment of the Superior Court of San Diego County, Kenneth L. Medel, Judge. Affirmed.

Christopher David Iverson appeals a judgment sentencing him to prison after a jury found him guilty of vehicle taking (Veh. Code, § 10851, subd. (a)), receiving a stolen vehicle (Pen. Code, § 496d, subd. (a)), and other crimes. Iverson contends the judgment must be reversed because the trial court erroneously excluded as hearsay his statement to friends that he had purchased the vehicle for $300. He also claims entitlement to 12 additional days of presentence conduct credits under the most recent

amendments to Penal Code section 4019. We reject these contentions and affirm the judgment.

I.

BACKGROUND

A. *The Prosecution Case*

George Baillum testified that he drove his Toyota pickup truck to a parking lot on October 11, 2010, locked it, and then joined a van pool to travel to work. When he returned to the parking lot later that day, his truck was gone.

A sergeant with the San Diego County Sheriff's Department testified that on May 15, 2011, he stopped a Toyota pickup truck with an inoperable taillight. The sergeant approached the truck; saw Iverson sitting in the driver's seat; and asked him for his license, registration and insurance. Iverson replied he did not have any identification with him, and gave the sergeant a false name and date of birth. While the sergeant was speaking to Iverson, a deputy sheriff arrived at the scene and informed the sergeant the truck had been reported as stolen. The sergeant ordered Iverson out of the truck and placed him in handcuffs.

The deputy testified that he searched the truck. He looked for proof that Iverson owned the truck, but found no document indicating such ownership. The deputy found insurance and other documents indicating Baillum was the owner, however. He also found several "shaved keys," which can be used to steal vehicles.

B. *The Defense Case*

James Devoss, Iverson's friend, testified that he loaned Iverson $300 in October or November 2010. After Devoss loaned him the money, Iverson acquired a dilapidated Toyota pickup truck.

Iverson testified that he borrowed $300 from Devoss to purchase a Toyota pickup truck he saw advertised on the Internet. When he acquired the truck in November 2010, Iverson "had paperwork," including "a DMV thing with the license plate number and the VIN number written down for the vehicle" and a bill of sale stating that "the vehicle was sold 'as is' to [him] for $300." This "paperwork" was in the truck when Iverson was arrested. Iverson did not register the truck when he bought it, but planned to do so "[a]s soon as [he] got it up to operable where it would pass smog."

Iverson further testified that he worked as a mechanic and tow truck operator. The keys the deputy found in the Toyota pickup truck were "basically work tools" used to unlock and operate impounded vehicles; they were not used for any illegal purpose.

C. *The Verdicts, Admissions, and Sentence*

The jury found Iverson guilty of vehicle taking (Veh. Code, § 10851, subd. (a)) and receiving a stolen vehicle (Pen. Code, § 496d, subd. (a)). It also returned verdicts and deadlocked on other counts not relevant to the issues on appeal.

Iverson admitted he had a prior conviction that qualified as a strike under the Three Strikes law. (Pen. Code, §§ 667, subds. (b)-(i), 1170.12.) He also admitted he had served two prior prison terms. (*Id.*, § 667.5, subd. (b).)

At the sentencing hearing, the court denied Iverson's motion to dismiss the allegations concerning his prior strike conviction; dismissed the allegations concerning one of his prison priors; and sentenced him to prison for seven years for the conviction of vehicle taking, consisting of the upper term of three years, doubled for the strike, plus one year for the prison prior. (See Veh. Code, § 10851, subd. (a); Pen. Code, §§ 18, 667, subd. (e)(1), 667.5, subd. (b).) The court imposed the same prison sentence for the conviction of receiving a stolen vehicle (Pen. Code, §§ 496d, subd. (a), 667, subd. (e)(1), 667.5, subd. (b)), but stayed execution (*id.*, § 654, subd. (a)). The court awarded 163 days of actual custody credits and 80 days of conduct credits, for a total credit of 243 days against Iverson's prison sentence.

II.

DISCUSSION

Iverson argues his convictions of vehicle taking and receiving a stolen vehicle must be reversed because the trial court erroneously excluded as hearsay his statement to friends that he had purchased the truck for $300. He also argues the trial court should have awarded him 12 additional days of conduct credits for the time he spent in custody from October 1, 2011, through October 24, 2011, in accordance with the most recent amendments to Penal Code section 4019. As we shall explain, neither argument has merit.

A. *Any Error in Excluding Iverson's Statement to Friends That He Purchased the Truck for $300 Was Harmless*

Iverson complains the court prejudicially erred when it prohibited him from introducing testimony from his friends that he told them he had purchased the Toyota pickup truck for $300. Before analyzing this contention, we set forth some additional background.

1. *Additional Background*

Before trial started, the prosecutor asked the court to exclude as inadmissible hearsay any testimony from Iverson's friends that Iverson told them he saw an advertisement for the truck on the Internet and bought it for $300. Iverson's trial counsel responded that such testimony was not hearsay because it would not be offered to prove the truth of the matter asserted; rather, it would be offered to prove Iverson did not have a culpable state of mind because he did not know the truck was stolen. The prosecutor countered by citing Evidence Code section 1252 and arguing the testimony was not admissible as to Iverson's state of mind because his statement to his friends was "self-serving" and lacked trustworthiness. After hearing further argument from counsel and taking the matter under submission, the court ruled the statement Iverson made to his friends was hearsay (Evid. Code, § 1200, subd. (a)), it did not fall within the state of mind exception (*id.*, § 1250), and it was inadmissible because it lacked trustworthiness (*id.*, § 1252).

2. *Legal Analysis*

We need not determine whether the trial court erred in excluding as hearsay the testimony of Iverson's friends that he told them he bought the truck for $300, for any such error was harmless. An appellate court may reverse a judgment on the ground of erroneous exclusion of evidence only if the error resulted in a "miscarriage of justice" (Cal. Const., art. VI, § 13; Evid. Code, § 354), i.e., only if "the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error" (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*)). There was no reasonable probability that Iverson would not have been convicted of vehicle taking and receiving a stolen vehicle had the jury heard the excluded testimony. The jury heard the substance of the excluded testimony through Iverson himself, who testified he bought the truck for $300 and had "paperwork" to prove it, and his friend Devoss, who testified he loaned Iverson the $300, but the jury still found him guilty. (See pt. I.B., *ante*.) Hence, exclusion of additional testimony from Iverson's friends that he told them he paid $300 for the truck was "harmless, because the excluded evidence was merely cumulative of properly admitted evidence." (*People v. Helton* (1984) 162 Cal.App.3d 1141, 1146.)[1]

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1 Many other cases are in accord. (See, e.g., *People v. Ervine* (2009) 47 Cal.4th 745, 777-780 [no prejudice in exclusion of defendant's postoffense handwritten statements as hearsay when defendant testified to substance of statements at trial]; *People v. Harris* (1989) 47 Cal.3d 1047, 1093 [exclusion as hearsay of evidence that "would have been cumulative" to other evidence admitted at trial "could not have been

We also reject Iverson's argument that the erroneous exclusion of the testimony from his friends that he told them he bought the Toyota pickup truck for $300 violated his federal constitutional right to present the "defense" that he did not know the truck was stolen, and that such error must be reviewed for harmlessness under the beyond-a-reasonable-doubt standard. Iverson forfeited this argument because he did not object at trial that exclusion of this testimony violated his federal constitutional rights. (See, e.g., *People v. Blacksher* (2011) 52 Cal.4th 769, 821.) In any event, the argument lacks merit:

> "As a general matter, the '[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense.' [Citations.] *Although completely excluding evidence of an accused's defense theoretically could rise to this level, excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense.* [Citation.] *If the trial court misstepped, '[t]he trial court's ruling was an error of law merely; there was no refusal to allow [defendant] to present a defense, but only a rejection of some evidence concerning the defense.'* [Citation.] Accordingly, the proper standard of review is that announced in [*Watson*, *supra*,] 46 Cal.2d 818, 836 . . . , and not the stricter beyond-a-reasonable-doubt standard reserved for errors of constitutional dimension (*Chapman v. California* (1967) 386 U.S. 18, 24 . . .)." (*People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103, italics added; accord, *People v. Cunningham* (2001) 25 Cal.4th 926, 998-999; *People v. Bradford* (1997) 15 Cal.4th 1229, 1325.)

Here, Iverson presented testimony from himself and Devoss to support his "defense" that he did not know the truck was stolen; the court excluded only some cumulative testimony from his friends that Iverson told them he bought the truck for $300. This case thus fits

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prejudicial"]; *People v. Lewie* (1959) 174 Cal.App.2d 281, 290 ["Assuming such evidence was admissible its exclusion was not prejudicial since it was merely cumulative to other evidence introduced by defendant on this subject."]; *People v. Valencia* (1938) 30 Cal.App.2d 126, 129 ["The law is established that the erroneous exclusion of evidence is not *prejudicial* error where the excluded evidence is cumulative to other evidence which is introduced at the trial."].)

squarely within the holding of *Fudge*, which is binding on us. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 [California Supreme Court's decisions "are binding upon and must be followed by all the state courts of California"].)

B. *Iverson Is Not Entitled to Additional Conduct Credits*

Iverson argues the most recent amendments to Penal Code section 4019 entitle him to 12 additional days of conduct credits, i.e., credits for performance of labor and for good behavior (*id.*, subds. (b), (c)). Specifically, Iverson contends (1) a "plain reading" of subdivision (h) of that statute indicates it was intended to apply to all defendants in presentence custody on or after October 1, 2011, regardless of when they committed their offenses; and (2) to apply the amendments only to presentence detainees who committed their offenses on or after that date violates his constitutional right to the equal protection of the laws. We disagree.

As an initial matter, Iverson forfeited the argument he is entitled to additional conduct credits. At the sentencing hearing, after the court awarded Iverson 163 days of actual custody credits and 80 days of conduct credits, it asked his counsel, "Sound better, counsel?" Counsel responded, "Yes, that sounds right." Having thus agreed to the trial court's award of presentence credits, Iverson lost the right to challenge on appeal any error in that award. (See *People v. Myers* (1999) 69 Cal.App.4th 305, 312 [defendant whose counsel stipulated to amount of presentence custody credits forfeited any alleged error in calculation].) Nevertheless, we shall consider the merits of Iverson's statutory construction and constitutional arguments, both to forestall a claim of ineffective

assistance of counsel (see, e.g., *People v. Russell* (2010) 187 Cal.App.4th 981, 993) and because we granted his application to file a supplemental brief raising those arguments.

We reject Iverson's claim that a "plain reading" of Penal Code section 4019 entitles him to an award of credits for time spent in presentence custody on or after October 1, 2011, at the enhanced rate prescribed by the statutory amendments that became operative on that date. Under the version of section 4019 in effect when Iverson committed his offenses (which was some time between Oct. 11, 2010, and May 5, 2011), a prisoner confined in a county jail prior to sentencing who earned all possible conduct credits was entitled to credit for six days for every four days spent in actual custody. (§ 4019, former subd. (f); Stats. 2010, ch. 426, § 2.) By the amendments that became operative October 1, 2011, the amount of credit for such prisoners was increased to four days for every two days spent in actual custody. (§ 4019, subd. (f); Stats. 2011, ch. 39, § 53.) The amendments "shall apply prospectively and shall apply to prisoners who are confined to a county jail . . . for a crime committed on or after October 1, 2011. Any days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law." (§ 4019, subd. (h).) Hence, "[t]his favorable change in the law does not benefit [Iverson] because it expressly applies only to prisoners who are confined to a local custodial facility '*for a crime committed on or after October 1, 2011.*'" (*People v. Lara* (2012) 54 Cal.4th 896, 906, fn. 9.)[2]

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2 The California Supreme Court made the same observation in *People v. Brown* (2012) 54 Cal.4th 314, where it rejected the defendant's claim that the most recent amendments to Penal Code section 4019 entitled him to retroactive presentence conduct

Recent decisions of the Courts of Appeal confirm that defendants like Iverson, who committed their crimes before October 1, 2011, but were in presentence custody after that date, are not entitled to receive credits at the increased rate prescribed by the current version of Penal Code section 4019. The Fifth District held that in enacting subdivision (h), "the Legislature's clear intent was to have the enhanced rate apply *only* to those defendants who committed their crimes on or after October 1, 2011. [Citation.] The second sentence does not extend the enhanced rate to any other group, but merely specifies the rate at which all others are to earn conduct credits." (*People v. Ellis* (2012) 207 Cal.App.4th 1546, 1553.) Following *Ellis*, Division Three of this court "read the second sentence as reaffirming that defendants who committed their crimes before October 1, 2011, still have the opportunity to earn conduct credits, just under prior law." (*People v. Rajanayagam* (2012) 211 Cal.App.4th 42, 52 (*Rajanayagam*).) We agree with these holdings and reject Iverson's claim that for the time he spent in county jail from October 1 through 24, 2011, he is entitled to conduct credits at the increased rate that became operative on October 1, 2011.

We also reject Iverson's argument that not giving him the benefit of the current version of Penal Code section 4019 violates his right to "the equal protection of the laws." (U.S. Const., 14th Amend., § 1; Cal. Const., art. I, § 7, subd. (a).) The United

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credits. The Supreme Court held: "This legislation does not assist defendant because its changes to presentence credits expressly 'apply *prospectively* . . . to prisoners who are confined to a county jail [or other local facility] *for a crime committed on or after October 1, 2011*.' [Citations.] Defendant committed his offense in 2006." (*Brown*, at p. 322, fn. 11.) Iverson is therefore wrong to assert that *Brown* supports his assertion that the amendments "appl[y] to all prisoners in custody after October 1, 2011."

States Supreme Court has held the Fourteenth Amendment "does not forbid statutes and statutory changes to have a beginning, and thus to discriminate between the rights of an earlier and later time." (*Sperry & Hutchinson Co. v. Rhodes* (1911) 220 U.S. 502, 505; see also *Califano v. Webster* (1977) 430 U.S. 313, 321 ["Congress may replace one constitutional computation formula with another and make the new formula prospective only"].) The California Supreme Court similarly has held that applying a statutory change prospectively only does not violate equal protection guaranties. (See, e.g., *People v. Floyd* (2003) 31 Cal.4th 179, 188-191 [rejecting equal protection challenge to prospective-only application of proposition that lessened punishment for offense]; *Baker v. Superior Court* (1984) 35 Cal.3d 663, 668 ["No significant constitutional problem is presented by the prospective repeal of the [mentally disordered sex offender] laws."].) Relying in part on this line of cases, California appellate courts have held that awarding conduct credits at different rates to defendants in presentence custody on or after October 1, 2011, based on whether they committed their offenses before that date or on or after that date, does not violate their equal protection rights. (*Rajanayagam, supra,* 211 Cal.App.4th at p. 55; *People v. Kennedy* (2012) 209 Cal.App.4th 385, 398 (*Kennedy*).)

The *Rajanayagam* court also held that awarding conduct credits at different rates based on the date of offense "bears a rational relationship to a legitimate state purpose."

(*Rajanayagam*, *supra*, 211 Cal.App.4th at p. 53.)[3] Specifically, the court reasoned that by prescribing prospective-only application of the current version of Penal Code section 4019,

> "the Legislature took a measured approach and balanced the goal of cost savings against public safety. The effective date was a legislative determination that its stated goal of reducing corrections costs was best served by granting enhanced conduct credits to those defendants who committed their offenses on or after October 1, 2011. To be sure, awarding enhanced conduct credits to everyone in local confinement would have certainly resulted in greater cost savings than awarding enhanced conduct credits to only those defendants who commit an offense on or after the amendment's effective date. But that is not the approach the Legislature chose in balancing public safety against cost savings. [Citation.] Under the very deferential rational relationship test, we will not second guess the Legislature and conclude its stated purpose is better served by increasing the group of defendants who are entitled to enhanced conduct credits when the Legislature has determined the fiscal crisis is best ameliorated by awarding enhanced conduct credit to only those defendants who committed their offenses on or after October 1, 2011." (*Rajanayagam*, at pp. 55-56.)

The Legislature's approach is consistent with its authority to "experiment individually with various therapeutic programs related to criminal charges or convictions" (*In re Huffman* (1986) 42 Cal.3d 552, 561) and "to control the risk of new legislation by limiting its application" (*People v. Lynch* (2012) 209 Cal.App.4th 353, 361).

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3 We reject Iverson's contention that "[t]he proper standard of review is strict scrutiny." Conduct "credit provisions authorize lessening the determinate term of imprisonment to be served as punishment for a particular offense"; they do "not involve any 'suspect' categories such as race, ancestry or national origin," or "encroach upon any fundamental rights." (*In re Stinnette* (1979) 94 Cal.App.3d 800, 805.) Thus, when such provisions are challenged as being in violation of the equal protection clause, courts apply rational basis review, not strict scrutiny. (*Ibid.*; accord, *Rajanayagam*, *supra*, 211 Cal.App.4th at p. 53; *Kennedy*, *supra*, 209 Cal.App.4th at p. 397; *In re Bender* (1983) 149 Cal.App.3d 380, 387-389.)

We agree with *Rajanayagam* that applying the current version of Penal Code section 4019 only to defendants who committed offenses on or after October 1, 2011, "bear[s] a rational relationship to cost savings." (*Rajanayagam, supra*, 211 Cal.App.4th at p. 55.) We also agree with *Kennedy* that there is "nothing irrational or implausible in a legislative conclusion that individuals should be punished in accordance with the sanctions and given the rewards (conduct credits) in effect at the time an offense was committed." (*Kennedy, supra*, 209 Cal.App.4th at p. 399.) We therefore reject Iverson's equal protection challenge to the prospective-only application of the most recent amendments to section 4019.

DISPOSITION

The judgment is affirmed.

IRION, J.

WE CONCUR:

McCONNELL, P. J.

O'ROURKE, J.